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JACKSONVILLE DISTRICT CORPS OF ENGINEERS
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REPLY TO
ATTENTION OF

Jacksonville District
Approach on Identifying Adjacent Wetlands and Isolated Waters
July 11, 2003

This paper consolidates and restates the longstanding approach of the Jacksonville District on identifying adjacent wetlands and isolated waters under the Corps Clean Water Act Regulatory Program. Although the District has generally provided this guidance informally to staff in the past, because of the current size of the District and the scrutiny on the Corps determinations of waters of the US after the SWANCC Supreme Court Decision, it is necessary to provide a written statement of the District's longstanding approach. This paper does not establish new policy guidance on waters of the US.

The Supreme Court's decision in the SWANCC case raises several issues that will be interpreted by Corps of Engineers rulemaking with EPA. In the interim, Districts have been directed to use the approach that they did prior to the "migratory bird rule" to make determinations of tributary systems, adjacent wetlands and isolated waters.

Adjacent Wetlands: Under the Corps Regulation, the term adjacent wetlands means *"bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent" wetlands. " (33CFR328.3(c)).* The District has viewed adjacent wetlands to have two components, a physical component and a hydrologic connection component. The Corps definition talks in terms of "narrow" non-water of the US features, such as river berms, man made barriers and the like.

As a rule of thumb, if a wetland is within 200 feet of open waters (defined in this context and used in this document as any flowing or standing surface water, even though the water may not be present for the entire year) of another water of the US (wetlands can not be adjacent to other wetlands, such as wetlands that are contiguous to open waters that are a tributary) then the wetland area is considered adjacent to that open water of another water of the US.

As provided in Corps regulations, wetlands cannot be adjacent to other wetlands, they must be adjacent to open waters of another water of the US. Open waters clearly include areas below the OHWM of any open water area such as a lake, pond or stream. Most "sloughs" and other headwater systems in Florida have "open waters" including very small channels that have evidence of an OHWM. The water does not have to be present or flowing year round, just to the extent that an OHWM is established.

Tributary: The concept of tributary is critical to determining whether an area is a water of the US. If there is any tributary with open waters, no matter how small, then wetlands may be "adjacent" to those open waters of the tributary. Any surface water connection that has a defined OHWM or is part of a continuum of wetlands, whether natural or man-made, is a tributary connection. This approach was used prior to the migratory bird rule" and subsequent to it was clarified and included in the preambles to the Nationwide permits reauthorizations (See Corps 2000 preamble to its Nationwide permits at Federal Register Vol. 65, No. 47, March 9, 2000, pages 12823 to 121824 and Corps 1991 preamble to its Nationwide permits at Federal Register Vol. 56, No. 226, November 2, 1991, pages 59112 to 59113). Under the District's traditional approach as clarified in the guidance in the Corps Nationwide permits preamble, a large portion of the canals, and drainage ditches in Florida are tributaries, because they re-route former natural flows of waters of the US. Specifically, if a canal or ditch replaces flow that previously occurred through a slough system, or sheetflow across the landscape, that canal or ditch has replaced the former water flow and becomes a tributary water of the US. The canal or ditch carries water and pollutants from upstream to downstream areas. Moreover, where a canal or ditch has connected a formerly isolated wetland and other waters of the US, and the canal or ditch has an OHWM or is part of a continuum of wetlands, then that canal or ditch, as well as the upstream wetland, becomes a tributary water of the US. Culverts under roads and other upland features, weirs, drop structures and other structures do not eliminate the tributary connection, provided there is some conveyance of water from upstream to downstream (even through mechanical means such as pumping for example). Similarly, some tributaries convey water from upstream to downstream in natural underground flow-ways such as in karst formations. Where a substantial amount of the water is determined by the Corps to flow regularly under normal conditions through such underground areas, the tributary connection is maintained, since pollutants flow directly from upstream to downstream areas.

Tributaries routed through treatment systems: In some situations in the Jacksonville District, tributaries have been routed through waste treatment systems (including stormwater management ponds). Our position is that although the waste treatment system itself is not jurisdictional, the conveyance from upstream to downstream is maintained and the jurisdictional connection to all of the upstream wetlands remains intact. Any party wanting to eliminate the tributary conveyance by filling the treatment pond for example, would also sever jurisdiction to all waters upstream of the filling. Those waters upstream of the filling would now be isolated. Therefore, the entity performing the filling would be required to either re-route the conveyance through some means such as a ditch, culvert, pipe, etc., or mitigate for all upstream losses of jurisdictional waters.

Isolated Waters: Wetlands or other waters that are surrounded by uplands and are not either adjacent or tributary as described above are isolated waters. This includes wetlands that directly communicate with ground water but do not have a "substantial" downstream flow to other waters of the US. Isolated waters that have no connection to interstate commerce other than use of the water or wetland by migratory birds are not waters of the US. The District has in the past used navigable use of an

isolated water as a connection to interstate commerce, and that interstate commerce connection is still valid. For example, if a pond, lake, or stream is physically isolated (no tributary connection to downstream waters) but has a public boat access, even for small watercraft, such as canoes or kayaks, that water remains a water of the US, because of the potential use by interstate travelers. Public boat ramps and other public boat access are very strong evidence of navigability on otherwise isolated lakes and ponds. However, there may be instances where a dedicated public access point is non-existent, but one or many "in fact" public access points are able to be utilized. All around this District, many people launch canoes and small boats at bridge crossings in state and local DOT RsOW. The basic assumption here is that one must have some way to reasonably access the water body without unlawfully trespassing on privately held property. Trespass on publicly owned property may still be an unresolved issue but given the decades old practice of allowing it in this District, it appears to be a legitimate way of accessing some waters.